No. 280

In the Supreme Court of the United States

OCTOBER TERM, 1940

DAVID SUBIN AND BENJAMIN SUBIN, TRADING AS ARCADIA HOSIERY COMPANY, PETITIONERS

v.

NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT.

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

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OPINIONS BELOW

The opinion of the court below (R. 991–1001) is reported in 112 F. (2d) 326. The findings of fact, conclusions of law, and order of the National Labor Relations Board (R. 954–981) are reported in 12 N. L. R. B. 467.

JURISDICTION

The decree of the court below (R. 1001–1002) was entered on March 30, 1940. A petition for rehearing (R. 1003–1026) was denied May 7, 1940

(R. 1039). The petition for a writ of certiorari was filed on July 25, 1940. The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925, and under Section 10 (e) and (f) of the National Labor Relations Act.

QUESTIONS PRESENTED

1. Whether there was substantial evidence to support the Board's findings that petitioners dominated, interfered with, and supported a labor organization of their employees in violation of Section 8 (1) and (2) of the Act and discriminatorily discharged certain of their employees in violation of Sections 8 (1) and (3) of the Act.

2. Whether, in the circumstances of this case, it was permissable for the Board to require petitioners to offer reinstatement to Richard Craner, one of the employees found to have been discriminatorily discharged.

3. A further question urged by petitioners, but which we think is not properly presented in this case, is whether the Board may require that an employer pay over to governmental relief agencies sums equal to the amounts disbursed by those agencies for the employment on work relief projects of employees discharged by the employer in violation of the Act.

STATUTE INVOLVED

The pertinent provisions of the National Labor Relations Act (Act of July 5, 1935, c. 372, 49 Stat.

449, 29 U. S. C., Supp. V, Sec. 151, *et seq.*) are set forth in the Appendix to the Petition (pp. 39–41).

STATEMENT

Upon the usual proceedings[1] the Board issued its findings of fact, conclusions of law and order (R. 954–981). The facts, as found by the Board and as shown by the evidence, may be summarized as follows:[2]

Beginning in July 1937, a substantial number of petitioner's employees joined the American Federation of Hosiery Workers, Branch No. 67, a labor organization herein called the Union (R. 957; R. 95, 125, 127). Petitioners at first refused to meet with the Union's representatives, but the local police chief finally succeeded in arranging a meeting (R. 958; R. 56–58, 96, 114). At this meeting, held August 9, 1937, petitioners would not read or discuss a proposed contract which the Union submitted; instead they produced a notice announcing liquidation of their business and advising their employees to seek employment elsewhere (R. 958; R.

[1] These, pursuant to Section 10 of the National Labor Relations Act, were: charge and amended charge (R. 1–4), complaint (R. 5–9), answer (R. 10–16), hearing before a trial examiner at which the Shop Committee, a labor organization alleged in the complaint to be company-dominated, intervened (R. 16–17, 23), intermediate report of the trial examiner (R. 891–924), exceptions thereto by petitioners and the Shop Committee (R. 925–953), oral argument (R. 956), and the filing of briefs before the Board (*ibid.*).

[2] In the following statement, the references preceding the semicolons are to the Board's findings and the succeeding references are to the supporting evidence.

55, 98, 871). At the Union's urging petitioners agreed to withhold posting this notice, but warned that they would post it if the Union caused "trouble" (R. 958; R. 56, 98–99).

There were sporadic meetings between representatives of petitioners and of the Union during the following months (R. 958–959; R. 115–117). About December 1, 1937, petitioners received from the Union, for posting in the plant, a notice requesting union members to handle grievances through the Union shop committee (R. 959; R. 103–105, 283, 287–288, 872). A few days later Plant Superintendent Weisbecker accosted Holsopple, the Union representative who had delivered the notice to petitioners, displayed the liquidation notice which petitioners had shown the Union representatives in August, and inquired whether the liquidation notice "would not be a better notice to hang up than the one you put in the office?" (R. 959; R. 290, 700). On the same day the liquidation notice was posted on the plant bulletin board (R. 959; R. 207, 297). Petitioners did not go out of business, and the Board found that they had no intention of doing so, and that the threats of liquidation were intended to frighten the employees into abandoning the Union (R. 959–960).

During the preceding summer, when the Union first became active in the plant, an attempt to form an unaffiliated labor organization had failed for lack of employee support (R. 960–961; R. 159–176). Thereafter Minucci, an employee promi-

nent in this effort, and some other employees, consulted with petitioners concerning the desirability of establishing a so-called "Numm-Bush Plan" of representation, of which one of the employees had read in the newspaper "Social Justice"; petitioners heartily endorsed this project and encouraged its advocates (R. 961–962; R. 184–191, 194–195, 197, 201, 203, 666–667).

Shortly after the posting of the liquidation notice on December 11, David Subin told Minucci that the business would be liquidated "unless some plan were arranged whereby he could operate in a nice, peaceful way" (R. 963; R. 73–74). Minucci, in collaboration with some local businessmen, then prepared a letter for the employees to sign (R. 962–963; 207–211). The letter stated that the signers were "sincerely loyal" to petitioners and were attempting "to relieve conditions which we assume have brought about" the liquidation notice and that the signers were not in accord with "any movement to bring about, through outside action any labor trouble or disorders which would tend to disrupt the present or subsequent policy at the Plant" (R. 962–963; 879). The letter also requested that petitioners negotiate concerning the proposed liquidation, with the signers "either in whole or through such individuals as you choose to designate" (R. 962–963; 879). The letter was circulated in the plant by Minucci and some other employees during working hours, and was signed by more than 200 employees (R. 963; 211, 226). Minucci and another employee

presented the signed letter to David Subin and thereafter collaborated with Subin in drafting the Shop Committee plan, a plan of employee organization based on the Nunn-Bush model (R. 963; R. 70, 211–212, 242–246). The resultant draft was submitted to petitioners' attorney for revision (R. 963; R. 212–213, 245, 591).

On December 23, Minucci assembled about 35 selected employees in the plant, calling some of them from their work; David Subin read the Shop Committee plan to the gathering and stated that he would recognize the Committee provided therein (R. 963–964; R. 213–215, 220, 223, 230, 592). Minucci presented the names of the five men, including himself, whom he had selected to serve as members of the Shop Committee, and called for objections or additions; none were made (R. 964; 218). On the same day, with petitioners' permission, a notice was posted in the plant announcing an employees' meeting to be held on the following day at a local hotel (R. 963; R. 216–217, 228–229). This meeting was attended by approximately 139 employees, who voted to adopt the Shop Committee plan (R. 964; R. 218, 41–42, 857). Under the plan the five Committeemen were constituted the bargaining agency for all the employees (*ibid.*).

The Board concluded that the Shop Committee plan thus established had been foisted upon the employees by petitioners; that petitioners had participated in its organization meetings and in the formulation of its structure; that the employees

had not freely accepted the Shop Committee plan but had submitted to it to avoid liquidation of petitioners' business and to obtain continued employment; and that petitioners had dominated, interfered with, and supported the Shop Committee in violation of Section 8 (1) and (2) of the Act (R. 964–965, 978).

The Board further found that petitioners discriminatorily discharged ten active members of the Union, including the chairman and vice chairman of the plant committee (R. 965–976, 978–979). Four of these were discharged on December 31, allegedly for reporting late on that day to clean their machines, a yearly task performed without pay (R. 965–967; R. 298–300, 340, 391, 425–426, 635, 706–707, 889; 282–283, 336, 378, 384–385, 420–421, 664). There was no specific hour for reporting for this purpose (R. 966; R. 296–297, 325, 327, 339, 352–353, 366, 385–387, 423, 707–708); the Superintendent knew that the four employees arrived at 12:30 p. m. because they had been attending a Union meeting (R. 966–967; R. 711–712), and his statement at the time that he intended to close the plant within an hour, so that it was too late then for them to clean their machines, was false (R. 967; R. 300, 678, 682). Two other employees, both active members and one the wife of the Union's committee chairman (R. 969; R. 444–445, 467–468, 472, 662), were discharged on January 7, assertedly for lack of work (R. 969; R. 671, 868); nevertheless other employees of less seniority were retained at

the same work (R. 969–970; R. 443, 445, 466–467, 671, 868). A seventh employee, Jackson, vice chairman of the Union committee (R. 972; R. 517–518, 664) was laid off "until further notice" but was never recalled, although other employees of lesser seniority doing the same work were retained, and although two other employees were promoted to that kind of work subsequent to Jackson's lay-off (R. 972–973; R. 524–525, 866). Farrell, too, was laid off and never recalled, although he applied and although two positions at his former work were filled by promotion (R. 973–974; R. 532, 534, 539, 543–544, 658, 662–663, 866–868). Beluch also was discharged, although he outranked in seniority all other employees performing like tasks, and although positions similar to his were thereafter filled by promotion (R. 975–976; R. 563–564, 567, 574, 576, 656, 866–868). Similarly, Klebes was laid off and was never recalled, although three positions similar to his were filled by promotion (R. 974–975; R. 550, 553–554, 655–656, 866–868).

Upon these findings, the Board ordered petitioners to cease and desist from the unfair labor practices found; to withdraw recognition from and disestablish the Shop Committee; to offer reinstatement with back pay to the ten employees discriminatorily discharged; to pay over to governmental relief agencies sums equal to the amounts disbursed by those agencies for the employment of the ten employees on work relief projects; and to post appropriate notices (R. 979–981).

Thereafter, petitioners and the Shop Committee filed separate petitions in the court below to review and set aside the Board's order (R. 982–983, 987–990). The Board answered, requesting enforcement of its order against petitioners (R. 983–987). On March 12, 1940, the Court handed down its opinion (R. 991–1001), enforcing the Board's order except as to reinstatement and back pay for one employee and as to back pay for one other employee.[3] A decree was entered accordingly on March 30, 1940 (R. 1001–1002). A petition for rehearing filed by petitioners (R. 1003–1026) was denied on May 7, 1940 (R. 1039).

ARGUMENT

1. Petitioners' contention (Pet. 18–32, 34–35) that the Board's findings of unfair labor practices are not supported by substantial evidence presents no question of general importance. Compare *National Labor Relations Board* v. *Waterman S. S. Co.*, 309 U. S. 206, 208; *National Labor Relations Board* v. *Bradford Dyeing Ass'n*, No. 588, last Term, decided May 20, 1940. Further, the evidence summarized in the Statement (*supra*, pp. 3–8) affords full support for the challenged find-

[3] The court found that Klebes was discharged because of inefficiency and not because of his union activities (R. 999), and held that Mrs. Holsopple should not be awarded back pay because "her time following the lay-off was largely occupied by family duties as a matter of her own choice" (R. 997).

ings.[4] Petitioners also contend (Pet. 21–28, 30–31) that in holding that the Board's findings have the requisite support the decision below is in conflict with other decisions in other circuits; however, each of those cases turned upon its own particular facts.

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[4] Petitioners contend (Pet. 34–35) that the court below erred in taking into account the seniority status of five of the employees (R. 997–1000) in approving the Board's findings that the purported layoffs of these employees were in fact discharges because of their union activities. Petitioners assert that there is no evidence that seniority rights were provided in the "contract of employment" and that "courts are not permitted to read terms into a contract of employment" (Pet. 35). The court below, of course, did nothing of the kind: petitioners conceded that they follow seniority in recalling laid off employees (R. 14) and both the Board and the court considered the failure to observe seniority in regard to these five employees as evidence that they were in fact discharged, not laid off, and that the discharges were discriminatory. The relevance of noncontractual seniority rights in situations of this kind has been repeatedly recognized by the courts. *Southern Colorado Power Co.* v. *National Labor Relations Board*, 111 F. (2d) 539, 544 (C. C. A. 10); *Burlington Dyeing & Finishing Co.* v. *National Labor Relations Board*, 104 F. (2d) 736, 739 (C. C. A. 4). Compare *Consolidated Edison Co.* v. *National Labor Relations Board*, 95 F. (2d) 390, 396 (C. C. A. 2), modified and affirmed, 305 U. S. 197; *New York Handkerchief Mfg. Co.* v. *National Labor Relations Board*, decided July 11, 1940 (C. C. A. 7); *Agwilines, Inc.* v. *National Labor Relations Board et al.*, 87 F. (2d) 146, 154 (C. C. A. 5); *National Labor Relations Board* v. *Kentucky Firebrick Co.*, 99 F. (2d) 89, 93 (C. C. A. 6); *National Labor Relations Board* v. *Remington Rand, Inc.*, 94 F. (2d) 862, 871 (C. C. A. 2), certiorari denied, 304 U. S. 576; *Montgomery Ward & Co.* v. *National Labor Relations Board*, 107 F. (2d) 555, 561 (C. C. A. 7).

2. The claim (Pet. 32–34) that the order reinstating Craner is invalid because he obtained other "regular and substantially equivalent employment" subsequent to his discharge by petitioners, is plainly without merit. The subsequent employment yielded a substantially smaller wage and was at a considerable distance from Craner's home (R. 970; 482–483); the decisions are uniform that such considerations adequately support a determination by the Board that the new employment is not equivalent to the old. *Mooresville Cotton Mills* v. *National Labor Relations Board,* 110 F. (2d) 179, 97 F. (2d) 959 (C. C. A. 4); *National Labor Relations Board* v. *Carlisle Lumber Co.,* 99 F. (2d) 533 (C. C. A. 9), certiorari denied, 306 U. S. 646; *National Labor Relations Board* v. *Botany Worsted Mills,* 106 F. (2d) 263 (C. C. A. 3); *Hartsell Mills Corp.* v. *National Labor Relations Board,* 111 F. (2d) 291 (C. C. A. 4); *Phelps Dodge Corp.* v. *National Labor Relations Board,* decided July 11, 1940 (C. C. A. 2). Petitioners' contention (Pet. 33) that any new employment "permanent in character" must be held to be "substantially equivalent" to the former position, is supported by no authority and is contrary to the cases cited above.

3. Finally, petitioners assert (Pet. 35–37) that the decree below, insofar as it enforces the provision (R. 981) of the Board's order which requires petitioners to pay over to governmental relief agencies sums equal to the amounts disbursed by those

agencies for the employment on work relief projects of the employees discriminatorily discharged by petitioners, is in conflict with *National Labor Relations Board* v. *Leviton Mfg. Co.*, 111 F. (2d) 619 (C. C. A. 2), and *National Labor Relations Board* v. *Tovrea Packing Co.*, 111 F. (2d) 626 (C. C. A. 9). In the cited cases similar work relief agency provisions were disapproved and denied enforcement, and in *Republic Steel Corp.* v. *National Labor Relations Board*, No. 14, this Term, this Court granted certiorari, limited to the work relief agency question. But in the present case petitioners raised no question in the court below concerning the "work relief" provision; that provision was not specifically challenged either in the petition for review (R. 982–983) or in petitioners' brief.[5] The court below made no mention of the provision, even in its summary of the Board's order (R. 992), and the point was not raised in the petition for rehearing (R. 1007–1025). Under these circumstances, the decision below cannot be taken as an

[5] Petitioners' brief below attacked the Board's findings and order as not supported by substantial evidence, and asserted that the disestablishment, reinstatement, and back pay, and cease and desist portions of the order constituted an abuse of discretion. It made no mention of the work relief provision. Brief for petitioners, No. 7092, October Term, 1938, Circuit Court of Appeals for the Third Circuit.

adjudication upon the validity of the "work relief" provision, and is not in conflict with the *Leviton* and *Tovrea* cases.[6]

[6] Prior to their decisions in the *Leviton* and *Tovrea* cases, both the Second and the Ninth Circuits enforced the work-relief provision in cases where its validity was not challenged. *National Labor Relations Board* v. *National Casket Co.*, 107 F. (2d) 992 (C. C. A. 2) (see 12 N. L. R. B., at 175–176); *North Whittier Heights Citrus Association* v. *National Labor Relations Board*, 109 F. (2d) 76 (C. C. A. 9), certiorari denied, No. 853, last Term (see 10 N. L. R. B., at 1297–1298). In the *National Casket* case the court said, "The validity of this provision has not been argued, and we express no opinion on the point" (107 F. (2d) 998).

The Seventh Circuit also enforced the work relief provision in cases where its validity was not challenged, although it has since, upon specific challenge, held the provision invalid. *Stewart Die Casting Corp.* v. *National Labor Relations Board*, decided July 3, 1940 (provision denied enforcement); *M. H. Ritzwoller Co.* v. *National Labor Relations Board*, decision upon rehearing, July 16, 1940 (provision denied enforcement); *National Labor Relations Board* v. *Lightner Publishing Corp.*, decided July 1, 1940 (provision enforced without discussion); *National Labor Relations Board* v. *J. Greenebaum Tanning Co.*, 110 F. (2d) 984 (provision enforced without discussion). See also the Brief in Opposition and the Supplemental Memorandum for the Board in *J. Greenebaum Tanning Co.* v. *National Labor Relations Board*, *supra*, pending on petition for certiorari, No. 152, this Term.

The normal practice of the circuit courts of appeals is to enforce provisions of Board orders which are not challenged, even though their validity has not been specifically upheld.

CONCLUSION

The petition presents no question of general importance, and there is no conflict of decisions. The petition should therefore be denied.

Respectfully submitted.

FRANCIS BIDDLE,
Solicitor General.
THOMAS E. HARRIS,
Special Attorney.

CHARLES FAHY,
General Counsel,
ROBERT B. WATTS,
Associate General Counsel,
LAURENCE A. KNAPP,
Assistant General Counsel,
MORTIMER B. WOLF,
FREDERICK M. DAVENPORT,
Attorneys,
National Labor Relations Board.

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